IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 13, 2007

STATE OF TENNESSEE v. JERMAINE R. WISEMAN

Appeal from the Criminal Court for Davidson County
No. 2004-D-2894 Mark J. Fishburn, Judge

No. M2006-00400-CCA-R3-CD - Filed June 4, 2007

The Appellant, Jermaine R. Wiseman, was convicted by a Davidson County jury of Class B felony possesion of cocaine, Class E felony possesion of marijuana, and misdemeanor possesion of drug paraphernalia. On appeal, Wiseman raises two issues for our review: (1) whether the trial court erred in denying his special request for a jury instruction with regard to the "allowable inference" a jury is permitted to make based upon the amount of the controlled substance possessed "in a possession for resale case" and (2) whether the evidence is sufficient to support his felony drug convictions. Finding no error, the judgment of the trial court is affirmed.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed

DAVID G. HAYES, J., delivered the opinion of the court, in which JERRY L. SMITH and J.C. MCLIN, JJ., joined.

Emma Rae Tennent (on appeal), Amy Harwell (at trial), Assistant Public Defenders, Nashville, Tennessee, for the Appellant Jermaine R. Wiseman.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Victor S. Johnson III, District Attorney General; and Rachel Sobrero, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

In July 2004, Metro police executed a search warrant at the Appellant's residence in Nashville based upon information that illicit drugs were located on the premises. Approximately thirty minutes prior to the execution of the warrant, the police had conducted a "pre-raid surveillance" of the residence and had observed eight to ten people enter the residence, stay a minute or so, and leave.

Upon entry by police into the residence, all persons inside were physically restrained in the exact location in which they were found. Three people were found in the living room and two in the kitchen. When he was first observed, the Appellant was approximately six inches from a couch in the living room. Located on the couch, in plain view, was a plastic sandwich bag, which contained 41.2 grams of cocaine, a bag of marijuana sitting on a "Tupperware" lid, a razor blade, and a set of digital scales. White powder residue was found on the scales. A search of a bedroom revealed the Appellant's clothes and personal effects, as well as his wallet and identification, which were found on the top of a dresser. In a separate dresser, police found a bag containing 23.2 grams of marijuana. Also found in the bedroom was a bag containing $1,684.00 in cash and a box of sandwich bags.

In the bathroom, police found a bag of crack cocaine floating in the toilet. Police explained that this cocaine had been placed in the toilet immediately prior to their entry and before they had detonated a diversionary device or "flash bang" during entry, which created sound waves and prevented the toilet from flushing. The cocaine recovered from the toilet weighed 25.2 grams.

Following a jury trial, the Appellant was found guilty of possession with intent to sell or deliver over twenty-six grams of a substance containing cocaine, possession of over one-half ounce of marijuana with intent to sell or deliver, and possession of unlawful drug paraphernalia. As a result of these convictions, the Appellant received an effective fifteen-year sentence as a Range II offender. This timely appeal followed.

Analysis

On appeal, the Appellant has raised two issues for our review. First, he argues that the trial court erred in refusing to modify the pattern jury instruction regarding the inferences which a jury may draw based upon the amount of drugs possessed in a felony possession drug prosecution. Second, the Appellant asserts there is insufficient evidence to support his convictions for possession of cocaine with intent to sell or deliver and possession of marijuana with intent to sell or deliver.

I. Jury Instruction

On appeal, the Appellant raises the issue, "Did the trial court err in denying the [Appellant's] special requested jury instruction clarifying that the amount of a controlled substance cannot alone support a conviction for possession with intent to sell?" Based upon the indicted charges that the Appellant "knowingly did possess with intent to sell or deliver" twenty-six grams or more of cocaine and not less than one-half ounce of marijuana,[1] the trial court submitted the following pattern instruction to the jury:

> It may be inferred from the amount of controlled substances possessed by an offender, along with other relevant facts surrounding the arrest, that the controlled

[1] *See* T.C.A. §§ 39-17-417(i)(5), -417(g)(1) (2006).

substance or substances were possessed with the purpose of selling or otherwise dispensing them.

T.P.I. Crim § 31.04 (7th ed. 2000).[2] The Appellant requested that the trial court add the following sentence: "However, the amount alone is not sufficient to support this inference." This request was denied.

In support of his argument, the Appellant cites as authority *State v. John Fitzgerald Belew*, No. W2004-01456-CCA-R3-CD (Tenn. Crim. App. at Jackson, Nov. 2, 2004), which held that "[i]t is not permissive for the weight alone to justify a conviction [for possession with intent to sell or deliver]." A panel of this court in *Belew* reduced the defendant's conviction for felony possession to misdemeanor possession because "the record [was] devoid of any evidence of [felonious] intent whatsoever," other than the amount possessed. The conviction was modified based upon insufficiency of the evidence and not from any inaccuracy or incompleteness within the pattern instruction. Indeed, the court in *Belew* acknowledged that Tennessee Code Annotated section 39-17-419 "permits the jury to draw an inference of intent to sell or deliver when the amount of the controlled substance and other relevant facts surrounding the arrest are considered together." The facts in *Belew* are clearly distinguishable from the relevant facts surrounding the Appellant's arrest in the present case. Accordingly, the holding in *Belew* has no application to this case and submission of the special jury request to the jury would have been improper under the facts. Thus, this issue is without merit.

II. Sufficiency of the Evidence

Our standard of review when the Appellant questions the sufficiency of the evidence on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). We do not reweigh the evidence; rather, we presume that the jury has resolved all the conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the State. *State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn. 1984); *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). Questions about witnesses concerning their credibility are resolved by the jury. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997).

It is a criminal offense for a person knowingly to "[p]ossess a controlled substance with intent to manufacture, deliver or sell such controlled substance." *See* T.C.A. § 39-17-417(a)(4) (2006). A person is guilty of possession with intent to sell or deliver marijuana, a Class E felony, if the amount involved is "not less than one-half (½) ounce (14.175 grams) nor more than ten pounds (10 lbs.) (4535 grams) of marijuana." *See* T.C.A. § 39-17-417(g)(1). A person is guilty of

[2] The language of the pattern instruction is a verbatim recitation from Tennessee Code Annotated section 39-17-419 (2006).

possession with intent to sell or deliver cocaine, a Class B felony, if the amount involved is "[t]wenty-six 26 grams or more of any substance containing cocaine." *See* T.C.A. § 39-17-417(i)(5).

A. Possession of Marijuana with Intent to Sell or Deliver

The Appellant does not contest the jury's finding that he possessed over one-half ounce of marijuana, but he asserts that it "was in his possession for personal use, not for resale or delivery." A trier of fact may infer that a defendant possessed controlled substances with the purpose of selling or dispensing them based on the amount of a controlled substance he possessed, along with other relevant facts surrounding the arrest. *See* T.C.A. § 39-17-419. When a defendant asserts there is insufficient evidence to support an inference that he possessed drugs with the culpable mental state, our review is only to consider whether "under the facts of the case, there is no rational way the trier [of fact] could make the connection permitted by the inference" beyond a reasonable doubt. *County Court of Ulster County v. Allen*, 442 U.S. 140, 157, 99 S. Ct. 2213, 2225 (1979); *State v. Bryant*, 585 S.W.2d 586, 589 (Tenn. 1979).

The proof in this case established that during the thirty minutes prior to execution of the search warrant, police observed eight to ten people enter the residence, stay a minute or so, then leave. Two bags of marijuana were found in the bedroom, which contained the Appellant's personal effects and identification. One bag weighed 23.2 grams. Also found in the bedroom was $1,684.00 and a box containing sandwich bags, which testimony established are customarily used to package marijuana and cocaine. Upon entry by the police, the Appellant was standing approximately six inches from a couch on which a "Tupperware" lid containing marijuana residue was found, along with a separate small bag of marijuana. Located nearby was a set of digital scales.

After reviewing the evidence in the light most favorable to the State, we conclude that there was ample evidence from which a rational trier of fact could have concluded that the Appellant possessed marijuana for purposes of sale or delivery.

B. Constructive Possession of Cocaine

The Appellant asserts there is insufficient evidence to support his conviction for possession of over twenty-six grams of a substance containing cocaine with intent to sell or deliver because the State failed to prove that the "cocaine found at the scene was ever in his possession." The Appellant does not contest the other elements of the offense, specifically that the substance was cocaine, that its weight was over the requisite amount, or that it was possessed with intent to sell or deliver.

A person may possess a controlled substance by actual or constructive possession. "The [S]tate may establish constructive possession by demonstrating that the defendant has the power and intention to exercise dominion and control over the controlled substance either directly or through others. . . . In essence, constructive possession is the ability to reduce an object to actual possession." *State v. Brown*, 915 S.W.2d 3, 7 (Tenn. Crim. App. 1995) (internal citation omitted). The element of knowledge of the presence of a controlled substance, for purposes of unlawful

possession, is oftentimes not susceptible to direct proof. Nonetheless, knowledge may be circumstantially proven by evidence of acts, statements, or conduct. *State v. Transou*, 928 S.W.2d 949, 956 (Tenn. Crim. App. 1996). Additionally, possession of the premises in which the contraband is found creates an inference that the possessor had possession of the contraband. *State v. Ross*, 49 S.W.3d 833, 846 (Tenn. 2001). However, as the Appellant correctly notes, "[o]ne's mere presence in an area where drugs are discovered, or one's mere association with a person who is in possession of drugs, is not alone sufficient to support a finding of constructive possession." *State v. Shaw*, 37 S.W.3d 900, 903 (Tenn. 2001)(citing *State v. Patterson*, 966 S.W.2d 435, 445 (Tenn. Crim. App. 1997); *State v. Cooper*, 736 S.W.2d 125, 129 (Tenn. Crim. App. 1987)). The Appellant notes that there were four other people in the house when the police entered and implies that the cocaine belonged to one of them.

After reviewing the evidence in the light most favorable to the State, we conclude that the evidence is sufficient to establish the Appellant's guilt, beyond a reasonable doubt, of felony possession of over twenty-six grams of a substance containing cocaine with intent to sell or deliver. First, because the Appellant had lawful possession of the premises, the jury was permitted to draw the inference that he had possession of the contraband, especially in this case where the drugs were in an open area and easily visible. The proof established that one bag of powder cocaine was found on the couch and weighed 41.7 grams and a second bag of crack cocaine, which weighed 25.2 grams, was found in the toilet. Additionally, a rational trier of fact could have concluded that the Appellant packaged the cocaine because a box of sandwich bags was recovered from one of his dressers, and police testified that the crack cocaine, as well as the powder cocaine, was packaged in sandwich bags. Moreover, a rational trier of fact could have concluded that the Appellant was selling marijuana and cocaine because of the large sum of money found in one of his dressers, the presence of drugs on the couch, and a set of scales next to the couch, which had cocaine residue on them. Furthermore, the breakdown of the money indicated it was proceeds from drug sales. Finally, the Appellant was found about six inches from the couch, and the open and obvious display of the drugs, scales, and razor blade indicated that the Appellant could easily exercise dominion and control over these items.

CONCLUSION

Based on the foregoing, this court affirms the Appellant's convictions for possession of over twenty-six (26) grams or more of a substance containing cocaine with intent to sell or deliver and possession of marijuana in an amount not less than one-half (½) ounce nor more than ten (10) pounds with intent to sell or deliver.

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DAVID G. HAYES, JUDGE